THE HISTORY OF TROVER.[1]

II.

REPLEVIN.

THE gist of the action of trespass *de bonis asportatis*, as we have seen, was a taking from the plaintiff's possession under a claim of dominion. The trespasser, like a disseisor, acquired a tortious property. Trespass, therefore, would not lie for a wrongful distress; for the distrainor did not claim nor acquire any property in the distress. This is shown by the fact that he could not maintain trespass or trover if the distress was taken from him on the way to the pound, or taken out of the pound,[2] but must resort to a writ of *rescous* in the one case, and a writ of *de parco fracto* in the other case. In these writs the property in the distress was either laid in the distrainee, or not laid in any one.[3]

But the distrainee, although debarred from bringing trespass, was not without remedy for a wrongful distress. From a very early period he could proceed against the distrainor by the action, which after a time came to be known as Replevin. This action was based upon a taking of the plaintiff's chattels and a detention of them against gage and pledge. Hence Britton and Fleta treat of this action under the heading "De Prises de Avers" and "De captione averiorum," while in Bracton and the Mirrour of Justices the corresponding titles are "De vetito namio" and "Vee de Naam." In the first part of this paper it was shown that the action of replevin was originally confined to cases of taking by

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[1] Continued from page 289.

[2] "The distrainor neither gains a general nor a special property nor even the possession in the cattle or things distrained; he cannot maintain trover or trespass.... It is not like a pledgee, for he has a property for the time; and so of a bailment of goods to be redelivered, bailee shall have trespass against a stranger, because he is chargeable over." Per Parker, C. B., Rex *v.* Cotton, Parker, 113, 121. See also Y. B. 21 Hen. VII. f. 1, pl. 1; Whitly *v.* Roberts, McClell. & Y. 107, 108; 2 Selw. N. P. (1st ed.) 1362; 2 Saund. (6th ed.) 47 b, n. (c).

[3] "He shall not show in the writ to whom the property of the cattle doth appertain, unless he choose to do so." Fitz. N. B. 100. Compare Bursen *v.* Martin, Cro. Jac. 46, Yelv. 36, 1 Brownl. 192, s. c., in which case a count in trespass "Quare equum cepit a persona querentis" was adjudged bad for not alleging the horse to be "suum."

way of distress,[1] but that in the reign of Edward III. it became a concurrent remedy with trespass. But the change was for centuries one of theory rather than of practice. In the four hundred years preceding this century there are stray *dicta*, but, it is believed, no reported decision that replevin would lie against any adverse taker but a distrainor.[2] We need not be surprised, therefore, at Blackstone's statement that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress."[3] Lord Redesdale, in Shannon *v.* Shannon,[4] dissented from this statement, saying that replevin would lie for any wrongful taking, and his opinion has been generally regarded as law.[5] But the attempt to extend the scope of the action so as to cover a wrongful detention without any previous taking was unsuccessful.[6] From what has been said, it is obvious that replevin has played a very small part in the history of trover, and we may therefore pass without more to the last and, for the purpose of the present essay, the most important of our four actions, the action of

DETINUE.

The appeal, trespass, and replevin were actions *ex delicto*. Detinue, on the other hand, in its original form, was an action *ex contractu*, in the same sense that debt was a contractual action. It was founded on a bailment; that is, upon a delivery of a chattel to be redelivered.[7] The bailment might be at will or for a fixed term, or upon condition, as in the case of a pledge. The contractual nature of the action is shown in several ways.

In the first place the count must allege a bailment, and a traverse of this allegation was an answer to the action.[8]

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[1] *Supra*, p. 287. See also 3 HARVARD LAW REVIEW, 31.

[2] See Mellor *v.* Leather, 1 E. & B. 619. Replevin against one, who took as finder, was allowed in Taylor *v.* James, Godb. 150, pl. 195.

[3] 3 Bl. Com. 146.

[4] 1 Sch. & Lef. 327.

[5] George *v.* Chambers, 11 M. & W. 149.

[6] Mennie & Blake, 6 E. & B. 847. In many jurisdictions in this country, however, with or without the aid of a statute, replevin became concurrent with detinue.

[7] A buyer could also bring detinue against the seller for the chattel sold but not delivered. But the position of the seller after the bargain was essentially that of a bailee. For an early case of detinue by a buyer, see Sel. Pl. Man. Cts., 2 Seld. Soc'y (1275), 138. The count for such a case is given in *Novæ Narrationes*, f. 68. See also Y. B. 21 Ed. III. f. 12, pl. 2.

[8] Y. B. 3 Ed. II. 78; Y. B. 6 Ed. II. 192. Compare Y. B. 20 & 21 Ed. I. 193. After the scope of detinue was enlarged, a traverse of the bailment became an immaterial traverse. Gledstone *v.* Hewitt, 1 Cr. & J. 565; Whitehead *v.* Harrison, 6 Q. B. 423, in which case the court pointed out a serious objection to the modern rule.

Again, detinue could not be maintained against a widow in possession of a chattel bailed to her during her marriage, because "ele ne se peut obliger."[1] Nor, for the same reason, would the action lie against husband and wife on a bailment to them both.[2] Thirdly, on a bailment to two or more persons, all must be joined as defendants, for all were parties to the contract.[3] On the same principle, all who joined in bailing a chattel must be joined as plaintiffs in detinue.[4] On the other hand, on the bailment by one person of a thing belonging to several, the sole bailor was the proper plaintiff.[5] For it was not necessary in detinue upon a bailment, as it was in replevin and trespass, to allege that the chattels detained were the "goods of the plaintiff."[6] Fourthly, the gist of the action of detinue was a refusal to deliver up the chattel on the plaintiff's request; that is, a breach of contract. Inability to redeliver was indeed urged in one case as an objection to the action, although the inability was due to the active misconduct of the defendant. "*Brown.* If you bail to me a thing which is wastable, as a tun of wine, and I perchance drink it up with other good fellows, you cannot have detinue, inasmuch as the wine is no longer *in rerum natura*, but you may have account before auditors, and the value shall be found." This, Newton, C. J., denied, saying detinue was the proper remedy.[7] It may be urged that the detinue in this case was founded upon a tort. But in truth the gist of the action was the refusal to deliver on request. This is brought out clearly by the case of Wilkinson *v.* Verity.[8] The defendant, a bailee, sold the chattel intrusted to his care. Eleven years after this conversion the bailor demanded the redelivery of the chattel, and upon the bailee's refusal obtained judgment against him on the breach of the contract, although the claim based upon the tort was barred by the Statute of Limitations. The breach of contract is obvious where the bailee was charged in detinue for a pure non-feasance, as where the goods were lost.[9] Fifthly, bailees were chargeable

[1] Y. B. 20 & 21 Ed. I. 189.

[2] Y. B. 38 Ed. III. f. 1, pl. 1; 1 Chitty Pl. (7th ed.) 104, 138.

[3] Y. B. 7 Hen. IV. f. 6, pl. 37. [4] Atwood *v.* Ernest, 13 C. B. 881.

[5] Y. B. 8 Ed. II. 270; Y. B. 49 Ed. III. f. 13, pl. 6, because "they (the owners) were not parties to the contract and delivery;" Bellewe, Det. Charters, 13 R. II.

[6] Whitehead *v.* Harrison, 6 Q. B. 423, citing many precedents.

[7] Y. B. 20 Hen. VI. f. 16, pl. 2. To the same effect, 7 Ed. III., Stath. Abr., Detinue, pl. 9; Y. B. 17 Ed. III. f. 45, pl. 1; 20 Ed. III., Fitz. Abr. Office del Court, 22.

[8] L. R. 6 C. P. 206; Ganley *v.* Troy Bank, 98 N. Y. 487, accord.

[9] Reeve *v.* Palmer, 5 C. B. N. S. 84. The early authorities are cited by Professor Beale in 11 HARVARD LAW REVIEW, 160, 161.

in *assumpsit*, after that action had become the common remedy for the breach of parol contracts.[1]

Finally, we find, as the most striking illustration of the contractual nature of the bailment, the rule of the old Teutonic law that a bailor could not maintain detinue against any one but the bailee. If the bailee bailed or sold the goods, or lost possession of them against his will, the sub-bailee, the purchaser, and even the thief, were secure from attack by the bailor. This doctrine maintained itself with great persistency in Germany and France.[2] In England the ancient tradition was recognized in the fourteenth century. In 1351 Thorpe (a judge three years later) said: "I cannot recover against any one except him to whom the charter was bailed."[3] Belknap (afterwards Chief Justice) said in 1370: "In the lifetime of the bailee detinue is not given against any one except the bailee, for he is chargeable for life."[4] Whether it was ever the law of England that the bailor was without remedy, if the bailee died in possession of the chattel, must be left an open question.[5] In a case of the year 1323 it was generally agreed that the executor of a bailee was liable in detinue.[6] But the plaintiff in that case, who alleged a bailment of a deed to A, and that the deed came to the hands of the defendant after A's death, and that defendant refused to deliver on request, failed because he did not make the defendant privy to A as heir or executor. Afterwards, however, the law changed, and it was good form to count of a bailment to A, and a general *devenerunt ad manus* of the defendant after A's death.[7] Belknap's statement also ceased to be law, and detinue

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[1] Wheatley *v.* Lowe, Palm. 28; Cro. Jac. 668, s. c. See 2 HARVARD LAW REVIEW, 5, 6.

[2] Heusler, Die Gewere, 487; Carlin, Niemand kann auf einen Anderen mehr Recht übertragen als er selbst hat, 42, 48; Jobbé-Duval, La Revendication des Meubles, 80, 165.

[3] Y. B. 24 Ed. III. f. 41, A, pl. 22.

[4] Y. B. 43 Ed. III. f. 29, pl. 11.

[5] In Sel. Cas. in Ch., 10 Seld. Soc'y, No. 116, a plaintiff, before going to Jerusalem, had bailed a coffer containing title deeds and money to his mother. The mother died during his absence, and her husband, the plaintiff's stepfather, refused to give up the coffer to the son on his return. The plaintiff brought his bill in chancery alleging that "because he [stepfather] was not privy or party to the delivery of the coffer to the wife no action is maintainable at common law, to the grievous damage," etc., "if he be not succoured by your most gracious lordship where the common law fails him in this case." See also Y. B. 20 & 21 Ed. I. 189.

[6] Y. B. 16 Ed. II. 490.

[7] Y. B. 29 Ed. III. 38, B, per Wilby, J.; Y. B. 9 Hen. V. f. 14, pl. 22; Y. B. 9 Hen. VI. f. 58, pl. 4. Paston, J. "The count is good enough notwithstanding he does

was allowed in the lifetime of the bailee against any one in possession of the chattel.[1] In other words, the transformation in the manner just described, of the bailor's restricted right against the bailee alone, to an unrestricted right against any possessor of the chattel bailed, virtually converted his right *ex contractu* into a right *in rem*.

It is interesting to compare this transformation with the extension at a later period of the right of the *cestuy que trust*. In the early days of uses the *cestuy que use* could not enforce the use against any one but the original feoffee to uses. In 1482 Hussey, C. J., said: "When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in by descent, that then no *subpœna* would lie.[2] Similarly, the husband or wife of the feoffee to uses were not bound by the use.[3] Nor was there at first any remedy against the grantee of the feoffee to uses although he was a volunteer, or took with notice of the use, because as Frowicke, C. J., said, "The confidence which the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use, as the law was taken until the time of Henry IV. [VI.?]."[4] One is struck by the resemblance between this remark of the English judge and the German proverb about bailors: "Where one has put his trust, there must he seek it again."[5] The limitation of the bailor at common law, and the *cestui que trust* in equity, to an action or suit against the original bailee or trustee, are but two illustrations of one characteristic of primitive law, the inability to create an obligation without the actual agreement of the party to be charged.[6]

not show how the deed came to defendant, since he has shown a bailment to B (original bailee) at one time." Martin, J. "He ought to show how it came to defendant." Paston, J. "No, for it may be defendant found the deed, and if what you say is law, twenty records in this court will be reversed."

[1] Y. B. 11 Hen. IV. f. 46, B, pl. 20; Y. B. 12 Ed. IV. f. 11, pl. 2, and f. 14, pl. 14; Y. B. 10 Hen. VII. f. 7, pl. 14.

[2] Y. B. 22 Ed. IV. f. 6, pl. 22. In Keilw. 42, pl. 7, Vavasour, J., said, in 1501, that the subpœna was never allowed against the heir until the time of Henry VI., and that the law on this point was changed by Fortescue, C. J.

[3] Ames, Cases on Trusts (2d ed.), 374, n.

[4] Anon., Keilw. 46, pl. 7. See also Ames, Cases on Trusts (2d ed.), 282–285.

[5] Wo man seinen Glauben gelassen hat, da muss man ihn wieder suchen.

[6] This same inability explains the late development of assumpsit upon promises implied in fact, and of *quasi*-contracts. The necessity of the invention of the writ *quare ejecit infra terminum* as a remedy for a termor, who had been ousted by his landlord's vendee, was due to this same primitive conception, for the vendee was not chargeable by the landlord's contract.

A trust, as every one knows, has been enforceable for centuries against any holder of the title except a purchaser for value without notice. But this exception shows that the *cestui que trust*, unlike the bailor, has not acquired a right *in rem*. This distinction is, of course, due to the fundamental difference between common-law and equity procedure. The common law acts *in rem*. The judgment in detinue is, accordingly, that the plaintiff recover the chattel, or its value. Conceivably the common-law judges might have refused to allow the bailor to recover in detinue against a *bona fide* purchaser, as they did refuse it against a purchaser in market overt. But this would have involved a weighing of ethical considerations altogether foreign to the medieval mode of thought. Practically there was no middle ground between restricting the bailor to an action against his bailee, and giving him a right against any possessor. Equity, on the other hand, acts only *in personam*, never decreeing that a plaintiff recover a *res*, but that the defendant surrender what in justice he cannot keep. A decree against a *mala fide* purchaser or a volunteer is obviously just; but a decree against an innocent purchaser, who has acquired the legal title to the *res*, would be as obviously unjust.

In all the cases of detinue thus far considered the action was brought by a bailor, either against the bailee or some subsequent possessor. We have now to consider the extension of detinue to cases where there was no bailment. Legal proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day the loser might claim it, and if he produced a sufficient *secta*, or body of witnesses, to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day.[1] There is an interesting case of the year 1234, in which after the estray had been delivered to the claimant upon his making proof and

[1] Sel. Pl. Man. Cts., 2 Seld. Soc'y (1281), 31. "Maud, widow of Reginald of Charlon, has sufficiently proved that a certain sheep (an estray) valued at 8*d*. is hers, and binds herself to restore it or its price in case it shall be demanded from her within year and day; pledges John Ironmonger and John Roberd; and she gives the lord 3*d*. for his custody of it." There is a similar case in the Court Baron, 4 Seld. Soc'y (1324), 144.

giving pledges, another claimant appeared. It is to be inferred from the report that the second claimant finally won, as he produced the better *secta*.[1] If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his *res adirata*, or *chose adirrée*, that is, his chattel gone from his hand without his consent;[2] or he might bring an appeal of larceny.[3] According to Bracton, the pursuer of a thief was allowed "rem suam petere ut adiratam per testimonium proborum hominum et si consequi rem suam quamvis furatam."[4] This statement of Bracton, taken by itself, would warrant the belief that the successful plaintiff in the action for a *chose adirrêe* had judgment for the recovery of the chattel. This may have been the fact; but it is difficult to believe that such a judgment was given in the popular court. No intimation of such a judgment is to be found in any of the earlier cases. It seems probable that Bracton meant simply that the plaintiff might formally demand his chattel in court as *adiratum*, and, by the defendant's compliance with the demand, recover it. For, in the sentence immediately following, Bracton adds that if the defendant will not comply with his demand, — "si . . . in hoc ei non obtemperaverit," — the plaintiff may proceed further and charge him as a thief by an appeal of larceny. This change from the one action to the other is illustrated by a case of the year 1233.[5] The count for a *chose adirrée* is described in an early Year Book.[6] The

[1] 3 Bract. Note Book, No. 1115.

[2] *Adiratus* is doubtless a corruption of *adextratus*, i. e., out of hand. In the precedents of trover and detinue sur trover in Coke's Entries, the plaintiff alleged that he casually lost the chattel "extra manus et possessionem." Co. Ent. 38, pl. 31; 40, pl. 32; 169, d, pl. 2.

[3] "And if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirrée*), in form of trespass, or an appeal of larceny by words of felony." Britton, f. 27. See also Britton, f. 46.

[4] Bract. 150 b. See also Fleta, 55, 63.

[5] 2 Bract. Note Book, No. 824. The plaintiff "dixit quod idem Willelmus in pace dei et Dom. Regis et ballivorum injuste detinuit ei tres porcos qui ei fuerunt addirati, et inde producit sectam quod porci sui fuerunt et ei porcellati et postea addirati." William disputed the claim, and the plaintiff then charged William as a thief "et parata fuit hoc disracionare versus eum, sicut femina versus latronem, quod legale catallum suum nequiter ei contradixit."

[6] 20 Ed. I. 466. "Note that where a thing belonging to a man is lost (*endire*), he may count that he (the finder) tortiously detains it, etc., and tortiously for this that whereas he lost (*ly fut endire*) the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

latest recognition of this action that has been found is a precedent in Novae Narrationes, f. 65, which is sufficiently interesting to be reproduced here in its original form.

De Chyval Dedit.

Ceo vous monstre W. &c. que lou il avoit un son chival de tiel colour price de taunt, tiel jour an et lieu, la luy fyst cel cheval dedire [adirré], et il alla querant dun lieu en autre, et luy fist demander en monstre fayre & marche et de son chival ne poet este acerte, ne poet oier tanquam a tiel jour quil vient et trova son cheval en la garde W. de C. que illonques est s. en la gard mesme cesty W. en mesme la ville, et luy dit coment son chival fuit luy aderere et sur ceo amena suffisantz proves de prover le dit chival estre son, devant les baylliefz et les gentes de la ville, & luy pria qui luy fist deliveraunce, et il ceo faire ne voyleit ne uncore voet, a tort et as damages le dit W. de XX. s. Et sil voet dedire &c. [vous avez cy &c. que ent ad suit bon].

This count points rather to damages than to the recovery of the horse. It is worthy of note, also, that its place in the "Novae Narrationes" is not with the precedents in detinue, but with those in trespass. There seems to be no evidence of an action of *chose adirrée* in the royal courts. Nor has any instance been found in these courts of detinue by a loser against a finder prior to 1371.[1] In that year a plaintiff brought detinue for an ass, alleging that it had strayed from him to the seignory of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender.[2] Detinue by a loser against a finder would probably have come into use much earlier but for the fact, pointed out in the first part of this paper, that the loser might bring trespass against a finder who refused to restore the chattel on request. Indeed, in 1455,[3] where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, Prisot, C. J., while admitting that a bailor might have detinue against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring detinue, but trespass, if, on demand, the finder refused to give up the goods. Littleton

[1] In Y. B. 2 Ed. III. f. 2, pl. 5, there is this *dictum* by Scrope, J.: "If you had found a charter in the way, I should have a recovery against you by *præcipe quod reddat*."

[2] Y. B. 44 Ed. III. f. 14, pl. 30. See also 13 Rich. II., Bellewe, Det. of Chart. Detinue against husband and wife. Count that they found the charters.

[3] Y. B. 33 Hen. VI. f. 26, pl. 12.

insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said: "This declaration *per inventionem* is a new-found Halliday; for the ancient declaration and entry has always been that the charters *ad manus et possessionem devenerunt* generally without showing how." Littleton was quite right on this point.[1] But the new fashion persisted, and detinue *sur trover* came to be the common mode of declaring wherever the plaintiff did not found the action upon a bailment to the defendant. In the first edition of "Liber Intrationum" (1510), f. 22, there is a count alleging that the plaintiff was possessed of a box of charters; that he casually lost it, so that it came to the hands and possession of the defendant by finding, and that he refused to give it up on request.[2] The close resemblance between this precedent and the earlier one from "Novae Narrationes" will have occurred to the learned reader. But there is one difference. In the count for a *chose adirrêe*, it is the plaintiff who finds the chattel in the defendant's possession. In detinue *sur trover* the finding alleged is by the defendant. And until we have further evidence that the action in the popular courts was for the recovery of the chattel and not for damages only, it seems reasonable to believe that detinue *sur trover* in the king's courts was not borrowed from the action of *chose adirrêe*, but was developed independently out of detinue upon a general *devenerunt ad manus*. But whatever question there may be on this point, no one can doubt that detinue *sur trover* was the parent of the modern action of trover.

Add to the precedent in the "Liber Intrationum" the single averment that the defendant converted the chattel to his own use, and we have the count in trover.

It remains to consider how the action of trover at first became concurrent with detinue, and then effectually supplanted it until its revival within the last fifty years.

There were certain instances in which detinue, in its enlarged scope, and trespass, did not adequately protect owners of chattels. Neither of these actions would serve, for instance, if a bailee or

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1 Littleton's remark seems to have been misapprehended in 2 Pollock & Maitland, 174. The innovation was not in allowing detinue where there was no bailment, but in describing the defendant as a finder. The old practice was to allege simply that the goods came to the hands of the defendant, as in Y. B. 3 Hen. VI. f. 19, pl. 31. See also Isaac *v.* Clark, 1 Bulst. 128, 130. In 1655 it was objected to a count in trover and conversion that no finding was alleged, but only a *devenerunt ad manus*. The objection was overruled. Hudson *v.* Hudson, Latch, 214.

2 A similar count in Lib. Int. f. 71.

other possessor misused the goods, whereby their value was diminished, but nevertheless delivered them to the owner on request. The owner's only remedy in such a case was a special action on the case. We find such an action in the reports as early as 1461,[1] the propriety of the action being taken for granted by both counsel and court.

If, again, after impairing the value of the goods, the bailee or other possessor refused to deliver them to the owner on request detinue would of course lie. But the judgment being that the plaintiff recover his goods or their value with damages for the detention,[2] if the defendant saw fit to restore the goods under the judgment, the plaintiff would still have to resort to a separate action on the case in order to recover damages for the injury to the goods. This was pointed out by Catesby in an early case,[3] and later by Serjeant Moore.[4] To prevent this multiplicity of actions, the plaintiff was allowed to bring an action on the case in the first instance, and recover his full damages in one action.

If a bailee destroyed the chattel bailed, the bailor, as we have seen, could recover its value in detinue. But if a possessor other than the owner's bailee destroyed the chattel, if, for instance, the tun of wine which Brown and his "*bons compagnons*" drank up, in the case already mentioned, had come to the hands of Brown in some other way than through bailment by the owner, it is at least doubtful if the owner could have recovered the value of the wine in detinue. Brown, in this case, never agreed with the owner to give up the wine on request. The plaintiff in detinue must therefore show a detention, which would be impossible of goods already destroyed. This was the view of Brian, C. J. This conservative judge went so far, indeed, as to deny the owner an action on the case under such circumstances, but on this latter point the other justices were "*in contraria opinione.*"[5]

If case would lie against any possessor for misusing goods of another, and also against a possessor other than a bailee for the

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[1] Y. B 33. Hen. VI. f. 44, pl. 7. See also Y. B. 9 Hen. VI. f. 60, pl. 10; Y. B. 2 Ed. IV. f. 5, pl. 9, per Littleton; Y. B. 12 Ed. IV. f. 13, pl. 9; Rook *v.* Denny, 2 Leon. 192, pl. 242.

[2] See Williams *v.* Archer, 5 C. B. 318, for the form of judgment in detinue.

[3] Y. B. 18 Ed. IV. f. 23, pl. 5: "If I deliver my clothes to you to keep for me, and you wear them so that they are injured, I shall have an action of detinue, . . . and afterwards an action on the case for the loss sustained by your using the clothes."

[4] (1510) Keilw. 160, pl. 2.

[5] Y. B. 12 Ed. IV. f. 13, pl. 9. See also Y. B. 9 Ed. IV. f. 53, pl. 15, per Billing, J.

destruction of the goods, it was inevitable that it should finally be allowed against a bailee who had destroyed the goods. Such an action was brought against the bailee in a case of the year 1479,[1] which is noteworthy as being the earliest reported case in which a defendant was charged with "converting to his own use" the plaintiff's goods.[2] Choke, J., was in favor of the action. Brian, C. J., was against it. Choke's opinion prevailed.[3]

Later, a wrongful sale was treated as a conversion. In 1510 the judges said an action on the case would lie against a bailee who sold the goods because "he had misdemeaned himself."[4] In a word, trover became concurrent with detinue in all cases of misfeasance.

Trover also became concurrent with trespass. In 1601 the Court of King's Bench decided that trover would lie for a taking.[5] In the same year the Court of Common Pleas was equally divided on the question, but in 1604, in the same case, it was decided, one judge dissenting, that the plaintiff might have his election to bring trespass or case.[6] The Exchequer gave a similar decision in 1610.[7] In 1627, in Kinaston *v.* Moore,[8] "semble per all the Justices and Barons, . . . although he take it as a trespass, yet the other may charge him in an action upon the case in a trover if he will."

In all these cases the original taking was adverse. If, however, the original taking was not adverse, as where one took possession as a finder, a subsequent adverse holding, as by refusing to give up the goods to the owner on request, made the taker, according to the early authorities cited in the first part of this paper,[9] a trespasser *ab initio*. Trover was allowed against such a finder in 1586,

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[1] Y. B. 18 Ed. IV. f. 23, pl. 5.

[2] The allegation of conversion occurs again in Y. B, 20 Hen. VII. f. 4, pl. 13; Y. B. 20 Hen. VII. f. 8, pl. 18; Mounteagle *v.* Worcester (1556), Dy. 121 a. The earliest precedents using the words "converted to his own use" are in Rastall's Entries, 4, d, pl. 1 (1547). Ibid. 8, pl. 1. In the reign of Elizabeth it was common form to count upon a finding and conversion.

[3] Y. B. 18 Ed. IV. f. 23, pl. 5; Y. B. 27 Hen. VIII. f. 25, pl. 3. "It is my election to bring the one action or the other, *i. e.*, detinue or action, on my case at my pleasure."

[4] Keilw. 160, pl. 2. To same effect, Vandrink *v.* Archer, 1 Leon. 221, a sale by a finder. The judges thought, however, that an innocent sale would not be conversion. But this *dictum* is overruled by the later authorities. Consol. Co. *v.* Curtis, '92, 1 Q. B. 495; 1 Ames & Smith, Cases on Torts, 328, 333, n. 4.

[5] Basset *v.* Maynard, 1 Roll. Ab. 105 (M), 5.

[6] Bishop *v.* Montague, Cro. El. 824, Cro. Jac. 50.

[7] Leverson *v.* Kirk, 1 Roll. Ab. 105 (M), 10.

[8] Cro. Car. 89.

[9] *Supra*, 288–289.

in Eason *v.* Newman,[1] Fenner, J., citing the opinion of Prisot, C. J., that the owner could maintain trespass in such a case.

That trover was allowed in Eason *v.* Newman as a substitute for trespass, and not as an alternative of detinue, is evident, when we find that for many years after this case trover was not allowed against a bailee who refused to deliver the chattel to the bailor on request. The bailee was never liable in trespass, but in detinue. In 1638, in Holsworth's Case,[2] an attempt to charge a bailee in trover for a wrongful detention was unsuccessful, as was a similar attempt nine years later in Walker's Case,[3] "because the defendant came to them by the plaintiff's own livery." A plaintiff failed in a similar case in 1650.[4] In the "Compleat Attorney,"[5] published in 1666, we read: "This action (trover) properly lies where the defendant hath found any of the plaintiff's goods and refuseth to deliver them upon demand; or where the defendant comes by the goods by the delivery of any other than the plaintiff." But in 1675, in Sykes *v.* Wales,[6] Windham, J., said: "And so trover lieth on bare demand and denial against the bailee."

By these decisions trover became concurrent with detinue in all cases, except against a bailee who could not deliver because he had carelessly lost the goods.[7] Indeed, trover in practice, by reason of its procedural advantages, superseded detinue until the present century.[8]

Although trover had now made the field of detinue and trespass its own, there was yet one more conquest to be made. Trespass, as the learned reader will remember, would not lie, originally, for a wrongful distress, the taking in such a case not being in the nature of a disseisin. In time, however, trespass became concurrent with replevin. History repeats itself in this respect, in the development of trover. In Dee *v.* Bacon,[9] the defendant pleaded to an action of trover that he took the goods damage feasant. The plea was adjudged bad as being an argumentative denial of the conver-

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[1] Goldesb. 152, pl. 79; Cro. El. 495, s. c.

[2] Clayt. 57, pl. 99.

[3] Clayt. 127, pl. 227.

[4] Strafford *v.* Pell, Clayt. 151, pl. 276.

[5] p. 86.

[6] 3 Keb. 282. See also Scot and Manby's Case (1664), 1 Keb. 449, per Bridgman.

[7] Even here the bailee was chargeable in case, *i. e.* assumpsit.

[8] In 1833, the defendant in detinue lost his right to defend by wager of law, and by the Common Law Procedure Act of 1854, c. 78, the plaintiff gained the right to an order for the specific delivery of the chattel detained. Under the influence of these statutory changes, detinue has regained some of its lost ground.

[9] Cro. El. 435.

sion. Salter *v.* Butler[1] and Agars *v.* Lisle[2] were similar decisions, because, as was said in the last case, "a distress is no conversion." The same doctrine was held a century later in two cases in Bunbury. But in 1770, in Tinkler *v.* Poole,[3] these two cases, which simply followed the earlier precedents, were characterized by Lord Mansfield as "very loose notes," and ever since that case it has been generally agreed that a wrongful distress is a conversion.[4]

This last step being taken, trover became theoretically concurrent with all of our four actions, appeal of larceny, trespass, detinue, and replevin, and in practice the common remedy in all cases of asportation or detention of chattels or of their misuse or destruction by a defendant in possession. The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract.

The parallel between trover and assumpsit holds good not only in the success with which they took the place of other common-law actions, but also in their usurpation, in certain cases, of the function of bills in equity. A defendant who has acquired the legal title to the plaintiff's property by fraud or duress, is properly described as a constructive trustee for the plaintiff. And yet if the *res* so acquired is money, the plaintiff may have an action of assumpsit for money had and received to his use; and if the *res* is a chattel other than money, the plaintiff is allowed, at least in this country, to sue the defendant in trover.[5] In some cases, indeed, an express trustee is chargeable in trover, as where an indorsee for collection refuses to give back the bill or note to the indorser. Lord Hardwicke, it is true, had grave doubts as to the admissibility of trover in such a case;[6] but Lord Eldon reluctantly recognized the innovation.[7] This innovation, it should never be forgotten, was a usurpation. Trover as a substitute for a bill in equity is, and always must be, an anomaly.

J. B. Ames.

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[1] Noy, 46.
[2] Hutt. 10.
[3] 5 Burr. 2657.
[4] 1 Ames & Smith, Cases on Torts, 274, n. 3.
[5] Thurston *v.* Blanchard, 22 Pick. 18; 1 Ames & Smith, Cases on Torts, 287, 288, n. 2.
[6] *Ex parte* Dumas, 2 Ves. 583.
[7] *Ex parte* Pease, 19 Ves. 46: "If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."